

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION

FILED

WAYNE HOUSTON WELCH,

Claimant,

v.

STATE OF TENNESSEE,

Defendant.

Claims Commission No. 200910967R  
Regular Docket

DEC 17 2009

Tennessee Claims Commission  
CLERK'S OFFICE

DOCKETED

C/B-COMM

DCA

AG

ALJ

FEE PAID

NOTICE SENT

FILED

ORDER GRANTING STATE'S MOTION TO DISMISS

THIS MATTER IS BEFORE the undersigned on the Defendant's Motion for Summary Judgment, the Claimant's Response, Brief in Opposition, and Statement of Undisputed Facts with attached affidavits, the Defendant's Reply in Support of Motion for Summary Judgment and Response to Statement of Undisputed Material Facts, as well as the Record as a whole.

Motions pending before the Tennessee Claims Commission are to be decided without oral argument pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(5)(a) unless otherwise ordered. There has been no order for oral argument in this matter. Further, there has been no motion by either party for oral argument.

**Procedural History.**

This claim was filed by Wayne Houston Welch with the Division of Claims Administration on March 25, 2009. On June 23, 2009, the Division transferred the claim to the Tennessee Claims Commission.

Mr. Welch alleges in his claim that on October 11, 2006, members of the Fourth Judicial Drug Task Force (hereinafter "DTF") were "negligent [in the] conduct [of] the performance of their duties".

In his filings, Mr. Welch alleges that on October 11, 2006, at approximately 7:00 p.m. the DTF commenced a six and one-half hour search of his home, outbuildings, and twenty (20) acres in the Chestnut Hill Community of Jefferson County, Tennessee, pursuant to a search warrant signed by Circuit Court Judge Richard Vance. Mr. Welch alleges that the Search Warrant was obtained primarily based upon information provided by an informant, a Mr. Gray, who himself was involved in the drug trade. According to Mr. Welch, the informant told the DTF that Mr. Welch had supplied him with marijuana and that subsequently, based on that allegation, a search warrant for his home and surrounding property was obtained.

According to Mr. Welch's claim and an Affidavit filed by he and his wife in opposition to the State's Motion for Summary Judgment, Mrs. Welch arrived home from her job at Food City in Sevierville, only to shortly thereafter encounter the DTF agents who told her they had a search warrant for the property. Mr. Welch was at the Chestnut Hill Fire Department building. He is a member of that group and was there planning a benefit for a member of the community. According to Mr. Welch's claim, a DTF agent told Mrs. Welch that marijuana had been found on the property.

Mrs. Welch asked officers if she could go to the fire hall and bring her husband home, and according to Mr. Welch, they grudgingly agreed.

According to Mr. Welch's claim, his home was ransacked during the search.

Apparently, all the officers found on the property were some marijuana seeds and stems. This contraband was transmitted to the Tennessee Bureau of Investigation ("TBI") Crime Lab but according to Mr. Welch's filings was lost in the process.

On January 2, 2007, the State presented the evidence developed regarding Mr. Welch to a Jefferson County Grand Jury and on March 7, 2007, an indictment was returned charging Mr. Welch with possession of marijuana with intent to sell or deliver. Shortly thereafter he was arrested but

posted bond, permitting his release from incarceration.

Subsequently, Mr. Welch engaged the legal services of Jonathan Holcomb, a prominent criminal defense lawyer, with offices in Morristown, Tennessee. Mr. Holcomb then commenced discovery in connection with his client's case.

On March 24, 2008, a suppression hearing was conducted in Jefferson County Circuit Court before O. Duane Slone, Circuit Court Judge.

According to Mr. Welch, following a successful suppression hearing, the State admitted that it had no additional proof regarding the charges against him. Therefore, following that admission, the State voluntarily dismissed the charges and an order was signed by Judge Slone formally disposing of the matter.

Mr. Welch's claim, in paragraph 20, alleges that several members of the DTF commenced a prosecution based on a search warrant which was negligently obtained. Mr. Welch goes on to allege that the negligence of the individual members of the DTF is imputable to the State.

In his claim, Mr. Welch also asserts the actions of task force members were not operational or discretionary and were a continuation of a similar pattern of overbearing conduct on the part of the DTF in drug case investigations and prosecutions.

According to the claim, the actions of individual DTF members also can be imputed to the State under theories of vicarious liability, agency/servant, respondeat superior, agency/principal, and generally, under Tennessee Code Annotated, Sections 8-42-101(c)(3), 8-7-110, and 9-8-307.

The original claim filed by Mr. Welch alleges negligent care, custody, and control of him actionable under Tennessee Code Annotated, Section 9-8-307(a)(1)(E); a negligent deprivation of state constitutional rights; defamation by libel and slander; and a violation of the Tennessee Human Rights Act. Mr. Welch seeks damages for personal injury and damages to his reputation.

Following the filing of the claim, the State submitted a Motion for Summary Judgment pursuant to the Tennessee Rules of Civil Procedure, Rule 56.03. In support of that Motion, the State also filed a Memorandum of Law, as well as the Affidavit of Anne Adams.

Preliminarily, it should be noted that Ms. Adams affied that each of the individual members of the DTF team, with the exception of Mr. McCoig, were state employees.

The State argues in its Motion that Mr. Welch's claims are barred by the one year statutes of limitation set out in Tennessee Code Annotated, Sections 28-3-103 and 28-3-104. The State also defends on the ground that Mr. Welch's claims for libel and slander are barred by its absolute immunity and that Welch's claim under Section 9-8-307(a)(1)(N), involving violations of Tennessee constitutional rights is not viable under Tennessee case law. The State also argues that Mr. Welch's claims under the Tennessee Human Rights Act should be dismissed since there is no allegation of discrimination against him on the basis of race, color, ancestry, religion, or national origin.

In a supporting Memorandum, the State expands on the grounds set out in its Motion.

First, the State argues that the allegations regarding the negligent acquisition of a search warrant resulting in Mr. Welch's arrest and later indictment occurred more than two years before he filed his claim. The State points out that under Tennessee Code Annotated, Section 9-8-402(b) the statute of limitations for tort actions set out in Tennessee Code Annotated, Section 28-3-104 (one year) bars Mr. Welch's claim. Further, the shorter six month statute of limitations found in Tennessee Code Annotated, Section 28-3-103, according to the State, bars his slander claim. The State goes on to argue that the allegations of slander and libel are absolutely privileged in connection with statements made to a judge in support of an application for a search warrant, and that the absolute immunity available to officers involved in that process is available to the state as a defense in a matter such as this. (See Tenn. Code Ann. § 9-8-307(d).)

The State presents case authority for the proposition that there is no private right of action under Tennessee Code Annotated, Section 9-8-307(a)(1)(N) for an alleged violation of the Tennessee Constitution by a state employee.

In connection with the Tennessee Human Rights claim, the Defendant questions whether in fact Mr. Welch's claim is actually a malicious harassment claim under Tennessee Code Annotated, Section 4-21-701 based on an alleged violation of Tennessee Code Annotated, Section 39-17-309 which prohibits discrimination and intimidation of an individual for freely exercising and enjoying constitutional rights by injury, threat, or coercion.

On September 22, 2009, Mr. Welch filed a Response to the State's Motion for Summary Judgment. In connection with that Response, he also submitted an Affidavit signed by him and his wife and a Statement of Additional Undisputed Material Facts. On October 5, 2009, with the agreement of the Office of the Attorney General, Mr. Welch filed a Brief in Opposition to Defendant's summary judgment motion.

In his Brief, Mr. Welch concedes that the Tennessee Human Rights Act is not applicable here, and that he has no private right of action under Tennessee Code Annotated, Section 9-8-307(a)(1)(N) for alleged violations of his Tennessee constitutional rights. However, he reserves his right to continue the action based on violations of other statutory rights. With regard to the statute of limitations defenses, Mr. Welch agreed that his slander and libel claims were time barred but still argues that his other claims are not precluded on that basis.

In his Supporting Memorandum, Mr. Welch argues that he has been deprived of a statutory right to be free of a prosecution developed without a showing of probable cause. Relying on Tennessee Code Annotated, Sections 40-7-103(3) and (4), Mr. Welch argues that he has a "statute right to be free of prosecution absent probable cause". He also argues that the State was guilty of

negligent care, custody, and control of him because of a negligent prosecution.

Mr. Welch asserts that his claims are not barred by a one year statute of limitations since he could not have known that he had been wronged until Judge Slone, based on the State's representations following the suppression hearing, dismissed the charges against him on March 24, 2008. (Mr. Welch's claim here was filed four (4) days short of the one year anniversary of the dismissal of charges on March 20, 2009.)

In support of his positions, Mr. Welch relies on *Stewart v. State*, 33 S.W.3d 785 (Tenn. 2000). While admitting that in *Stewart* the Court found no care, custody, or control by the State, he asserts that it is possible for the State to negligently exercise care, custody, or control outside a prison or a jail setting. He argues that the State was negligent in his case in obtaining a search warrant, and that the arrest provided the State with "some sort of control" over him. That control continued, he claims, by virtue of the bond he was required to post following his arrest, thus limiting his freedom. Mr. Welch also argues that the one year statute of limitations did not expire since the alleged torts committed against him continued until the charges were dismissed in March of 2008. In his Brief, Mr. Welch argues that he could not have known of the accrual of his cause of action until the favorable termination of the charges against him in March of 2008.

Mr. Welch characterizes his claim as one "being made ... for negligent deprivations of statutory rights and negligent care, custody, and control".

In the Affidavit filed in support of his Opposition to the State's Motion, Mr. Welch states, inter alia, that on October 11, 2006, he believed what the DTF agents were doing was valid. (See paragraph 11.) He states that he was not schooled in the practice of law at that time and not aware of chain of custody concepts until the discovery process was initiated, and he learned that a sample sent to the TBI crime lab had been lost. (See paragraph 14.) He goes on to claim in paragraph 15 of that Affidavit

that he did not know anything about police procedures until he was informed about “various gaffes”. He also states that during the prosecution of the case against him, he learned that the informant, Mr. Gray, told law enforcement that Mr. Welch was a drug supplier. Mr. Welch claims that he first knew he had a cause of action “after ... nearly sixteen months of negligent preparation and prosecution” [by the State] which had been covered up. Mr. Welch states that he “had no real knowledge that they had nothing on us until the day the court dismissed the criminal charges against [him]”.

### **Decision.**

This is an extremely interesting case in which the State has filed a Motion for Summary Judgment to which the respondent has filed a Response. Subsequently, the State filed a Reply to the Claimant’s Response. Both parties have filed memoranda of law in support of their respective positions, and Mr. Welch and his wife have filed an Affidavit in support of Claimant’s position.

The important dates in this matter are as follows: on October 11, 2006, the Fourth Judicial District Drug Task Force (DTF) executed a search warrant at Claimant’s home in connection with a marijuana investigation. On January 2, 2007, a case against Mr. Welch was presented to the Jefferson County Grand Jury and an indictment following that proceeding, was filed on March 7, 2007. According to paragraph 17 of the claim here, within a week of the filing of the indictment, Mr. Welch was arrested on a charge of possession of marijuana with intent to sell or deliver. Subsequently, Mr. Welch engaged the services of a prominent criminal defense lawyer, Jonathan Holcomb of the Hamblen County Bar, and on March 24, 2008, O. Duane Slone, Circuit Court Judge, granted a Motion to Suppress Evidence on the basis of an improperly issued search warrant. The charges against Mr. Welch were immediately “voluntarily dismissed” by the State and an order to that effect was entered. (See paragraph 19 of claim.) Subsequently, on March 25, 2009, Mr. Welch lodged this claim against the State with the Division of Claims Administration.

Apparently, prior to the search of his home and surrounding property, both Mr. Welch and his wife enjoyed a stellar reputation in their home community of Chestnut Hill, Tennessee, and had also enjoyed employment success both in industry and in a business started by Mr. Welch.

In his Brief in Opposition to Defendant's Motion for Summary Judgment, Mr. Welch has conceded that his initial claim based on the Tennessee Human Rights Act is not viable. He also acknowledges there that the Tennessee Claims Commission Act provides him no private right of action based on the Constitution of the State of Tennessee but reserves any other statutory rights claims he may have. Finally, Mr. Welch does not dispute that his original claims of libel and slander are time barred by the appropriate statutes of limitation.

What is clear from all of the documents filed by both parties in this case is that Mr. Welch's claim is grounded on his contention that his property was searched pursuant to a search warrant negligently obtained, and that the deficient warrant was the basis for his subsequent indictment and arrest in Jefferson County. While either party may attempt to characterize this claim using other monikers, the allegations clearly allege DTF activities violative of the Fourth Amendment to the United States Constitution and Article I, Section VII, of the Tennessee Constitution.

The Fourth Amendment to the United State Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing in the place to be searched, and the persons or things to be seized. (Emphasis supplied.)

Article I, Section VII, of the Tennessee Declaration of Rights reads as follows:

That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search respective places, without evidence of a fact committed, or to seize any person or persons not named, whose offences are not particularly described and



supported by evidence, are dangerous to liberty and ought not to be granted". (Emphasis supplied.)

The standard for granting or denying summary judgment motions has recently come under close scrutiny in Tennessee.

An opinion authored by Justice Wade in *Martin v. Norfolk Southern Railroad*, 271 S.W.3d 76 (Tenn. 2009), sets out a succinct synopsis of the current state of summary judgment procedure:

The moving party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn.2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993). Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn.2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn.1998). If the moving party fails to make this showing, then "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *McCarley*, 960 S.W.2d at 588; *accord Staples*, 15 S.W.3d at 88.

The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn.2008); *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n. 5. Both methods require something more than an assertion that the nonmoving party has no evidence. *Byrd*, 847 S.W.2d at 215. Similarly, the presentation of evidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient. *McCarley*, 960 S.W.2d at 588. The moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the

nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. We have held that to negate an essential element of the claim, the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party. See *Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn.2004). If the moving party is unable to make the required showing, then its motion for summary judgment will fail. *Byrd*, 847 S.W.2d at 215.

If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06. *McCarley*, 960 S.W.2d at 588; accord *Byrd*, 847 S.W.2d at 215 n. 6. The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *McCarley*, 960 S.W.2d at 588. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.* at 83-84.

As has long been well-established, the jurisdiction of the Tennessee Claims Commission, established in 1984 and effective as of 1985, represents a waiver of the state's usual immunity against lawsuits. A brief history of the development of that waiver is perhaps useful here.

"The doctrine of sovereign immunity is 'a principle of the common law as old as the law itself, that the king is not bound by any statute, if he be not expressly named to be so bound'." *The Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827, 848 (Tenn. 2008), citing *Auto Sales, Co. v. Johnson*, 122 S.W.2d 453, 455 (1938) for a quotation found there from *State v. Kinne*, 41 N.H. 238 (1860).

“[A]t common law, the [S]tate was absolutely immune from tort liability, as were cities and counties . . . .” *Lucas v. State*, 141 S.W.3d 121, 125 (Tenn. 2004). “This doctrine of sovereign immunity ‘has been a part of the common law of Tennessee for more than a century[,] and [it] provides that suit may not be brought against a governmental entity unless that governmental entity has consented to be sued.’” *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000) (*quoting Hawks v. Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1997)) (second alteration in original). Hence, “[i]t is now a well-settled principle of [both] constitutional and statutory law in this state that ‘[t]he State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued.’” *Stewart*, 33 S.W.3d at 790 (*quoting Brewington v. Brewington*, 387 S.W.2d 777, 779 (Tenn. 1965)) (third alteration in original).

“The longstanding tradition in this state has been that governmental entities may prescribe the terms and conditions under which they consent to be sued including when, in what forum, and in what manner suit may be brought.” *Cruse v. City of Columbia*, 922 S.W.2d 492, 495 (Tenn. 1996) (citation omitted). This is because “our legislature has always had the authority to waive its protections.” *Id.* The Constitution of the State of Tennessee accordingly provides that “[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct.” Tenn. Const. Art. I, § 17.<sup>2</sup> “Pursuant to [this] constitutional power to provide for suits against the [S]tate, the legislature created the Tennessee Claims Commission in 1984 to hear and adjudicate certain monetary claims

---

<sup>1</sup> “The immunity of the [S]tate and the separate immunities of cities and counties developed along different paths through statutory modifications and partial abrogations of immunity.” *Lucas*, 141 S.W.3d at 125.

<sup>2</sup> The doctrine of sovereign immunity is also codified in Tenn. Code Ann. § 20-13-102 which provides in pertinent part as follows: “no court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law by an officer of the state, or counsel employed for the state”.

against the State of Tennessee.” *Stewart*, 33 S.W.3d at 790.<sup>3</sup> However, the Claims Commission’s “jurisdiction is limited only to those claims specified in Tennessee Code Annotated, Section 9-8-307(a). If a claim falls outside of the categories specified in Section 9-8-307(a), then the [S]tate retains its immunity from suit, and [the] claimant may not seek relief . . . .”<sup>4</sup> *Id.*

“[T]he entire statutory purpose of the Tennessee Claims Commission Act is to establish the state’s liability in tort based on the traditional tort concepts of duty and the reasonably prudent persons’ standard of care.” *Lucas*, 141 S.W.3d at 130. The statute, however, works as a limitation on liability; it provides, “For causes of action arising in tort, the [S]tate shall only be liable for damages up to the sum of three hundred thousand dollars (\$300,000) per claimant and one million dollars (\$1,000,000) per occurrence.” *Id.* (quoting Tenn. Code Ann. § 9-8-307(e)). Moreover, “[t]he [S]tate may assert any and all defenses, including common law defenses, [and] any absolute common law immunities available.” *Id.*

“The courts of this [S]tate have [also] held that any statute granting jurisdiction to hear a claim against the [S]tate must be strictly construed, as any such statute is in derogation of the common law rule of sovereign immunity.” *Stewart*, 33 S.W.3d at 790; see also *Daley v. State*, 896 S.W.2d 338, 340 (Tenn. Ct. App. 1993) and *Beare Company v. Olsen*, 711 S.W.2d 603, 605 (Tenn. Ct. App. 1986). However, the legislature amended Section 9-8-307(a) in 1985 to reflect “its intention as to the jurisdictional reach of the Claims Commission . . . .” *Id.* at 791. The provision established “the intent of the general assembly that the jurisdiction of the Claims Commission be liberally construed to

---

3 “An enabling statute that grants a court subject matter jurisdiction to hear claims against a state will likewise constitute an explicit legislative waiver of sovereign immunity.” *Colonial Pipeline Company* at Fn. 17.

4 “We are not concerned in this case with the separate statutory development of the limited abrogation of sovereign immunity made applicable to cities and counties by the Tennessee Governmental Tort Liability Act since [t]his act is not and never has been applicable to the State of Tennessee or its agencies and departments.” *Lucas*, 141 S.W.3d at 126 (citing *Tenn. Dep’t of Mental Health v. Hughes*, 531 S.W.2d 299 (Tenn. 1975)). Accordingly, any discussion of whether actions of state employees were “operational” or “discretionary” has no role to play in the disposition of this case.

implement the remedial purposes of this legislation.” Tenn. Code Ann. § 9-8-307(a)(3). Therefore, “courts [must] defer to this expressed intention in cases where the statutory language legitimately admits of various interpretations.” *Stewart*, 33 S.W.3d at 791. This “policy of liberal construction of statutes, however, only requires th[e] court to give ‘the most favorable view in support of the petitioner’s claim,’ and . . . ‘does not authorize the amendment, alteration[,] or extension of its provisions beyond [the statute’s] obvious meaning.’” *Id.* (quoting *Pollard v. Knox County*, 886 S.W.2d 759, 760 (Tenn. 1994); *Brady v. Reed*, 212 S.W.2d 378, 381 (Tenn. 1948)). A liberal construction in favor of jurisdiction should be given “only so long as (1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the ‘most favorable view in support of the petitioner’s claim’ is not clearly contrary to the statutory language used by the [g]eneral [a]ssembly.” *Stewart*, 33 S.W.3d at 791.

Initially, this Commission did have jurisdiction over claims alleging constitutional violations. However, in 1989, following United States Supreme Court decisions in *Parratt v. Taylor*, 451 U.S. 521, 101 S.Ct. 1908 (1981), and *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986), the General Assembly deleted Constitutional claims from those authorized by the Commission’s jurisdictional grant found in Tennessee Code Annotated, Section 9-8-307(a)(1)(N). (See also *Shell v. State*, 893 S.W.2d 416, 426 (1995).)<sup>5</sup>

*Shell v. State*, *supra*, at p. 13 is interesting for several reasons. First, the Claimant there was able to pursue a constitutional claim before the Commission since the Court found that the 1989 revision of

---

<sup>5</sup> Likewise, it has been clear for some time that there is “no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer”. *Lee v. Ladd*, 834 S.W.2d 323, 324 (Tenn. App. 1992); see also *Bennett v. Horne*, 1989 WL 86555 (No. 89-31-II, Tenn. Ct. App. Fld in Nash. August 2, 1989); and *Bowden Building Corp. v. Tennessee Real Estate Com’n*, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999), for the proposition that there are no implied causes of action in Tennessee based upon alleged violations of the Tennessee Constitution. This later category of case is sometimes referred to in federal cases as a “Bivens” action because of its genesis in the United States Supreme Court case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395-97, 91 S.Ct. 1999, 2004-05, 29 L.Ed.2d 619 (1971).

Tennessee Code Annotated, Section 9-8-307(a)(1)(N) deleting constitutional claims from that jurisdictional category did not apply retroactively, and thus the actions of an Assistant District Attorney General, including providing Claimants' names to private attorneys causing numerous civil lawsuits to be filed against them, use of improper interview techniques with children, withholding exculpatory evidence from a Grand Jury, and destruction of tapes of interviews of children, all occurred prior to the effective date of the amendment to subsection N, and therefore, were still justiciable before this Commission.

However, the majority decision in *Shell* also held that the claims were barred by a one year statute of limitations since Claimants' cause of action accrued "when the plaintiff had suffered a legally cognizable injury". *Id.* at 423. In that case, the Court noted that Claimants were aware of the prosecutor's wrongdoings and their attorneys, in fact, had filed various motions in connection with the prosecution more than one year before their claims before the Commission were lodged. Additionally, the discovery process involved in the criminal case made the Claimants' attorneys aware that the prosecutor had engaged in tampering with important evidence. *Id.* at 422-423.

Here, the Claimant has filed, call it what he may, an action which is clearly bottomed on an alleged breach of state and federal constitutional rights which occurred when in an improvidently applied for and granted search warrant resulted in his criminal indictment and prosecution.<sup>6</sup>

As the Claimant has acknowledged, there is no jurisdiction before the Commission over such claims brought pursuant to the Tennessee Constitution. Although the Claimant attempts to characterize the grounds of his claim as being a case of negligent care, custody, and control, the clear basis for the claim is that his arrest and subsequent prosecution occurred because a search warrant was issued without

---

<sup>6</sup> In his dissent in *Shell*, Justice Reid relied on Justice Ruth Bader Ginsburg's concurrence in *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807 (1994). Mr. Albright, in that case, contended that he had been arrested without probable cause. The importance of *Albright* for present purposes is that the plurality, including Justice Ginsburg, characterized that arrest as a violation of the Fourth Amendment to the United States Constitution, rather than a substantive due process issue under the Fourteenth Amendment. Therefore, the absence of probable cause formed the basis of a constitutional claim. To reiterate, this Commission does not have jurisdiction over claims alleging a negligent violation of constitutional rights and has not had such jurisdiction since 1989.

“probable cause” and “without evidence of a fact committed” in violation of federal and state constitutional provisions respectively.

Mr. Welch’s attempt to transmute his claim into a cause of action under Tennessee Code Annotated, Section 9-8-307(a)(1)(E), while creative, cannot once again empower this Commission with a jurisdictional peg the General Assembly took from us in 1989.<sup>7</sup>

However, assuming solely for purposes of argument that Mr. Welch’s claim could constitute a case of negligent care, custody, and control under Tennessee Code Annotated, Section 9-8-307(a)(1)(E), the claim still must be dismissed since it was not filed until March 20, 2009, far more than one year after his property was searched on October 11, 2006. Likewise, this claim was filed more than a year after Mr. Welch was indicted and arrested in March of 2007.

It is clear from what Mr. Welch has filed in his opposition to the State’s Motion that he was

---

<sup>7</sup> The Claimant also appears to contend that he has been deprived of statutory rights and therefore has a cause of action under Tennessee Code Annotated, Section 9-8-307(a)(1)(N), which provides as follows:

**9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions**  
**Transfer of claims.**

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

...  
(N) Negligent deprivation of statutory rights created under Tennessee law, except for actions arising out of claims over which the civil service commission has jurisdiction. The claimant must prove under this subdivision (a)(1)(N) that the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state’s violation of the particular statute’s provisions;... (Emphasis Supplied.)

At one point, the statutory right underlying this position appears to be in Section 9-8-307(a)(1)(E), which provides as follows:

**9-8-307. Jurisdiction Claims Waiver of actions Standard for tort liability Damages Immunities Definitions**  
**Transfer of claims.**

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

...  
(E) Negligent care, custody and control of persons; ...

However, this assertion is not viable since subsection N requires that the Claimant must show that “the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state’s violation of a particular statute’s provision”. Subsection E, like subsection N, is solely a jurisdictional peg. The Claimant must then identify some provision in the Code which specifically provides for a private right of action against the State. Relying on Tennessee Code Annotated, Section 9-8-307(a)(1)(E) does not provide that explicit right called for in a Section 9-8-307(a)(1)(N) action. Finally, in his brief opposing summary judgment, Mr. Welch posits Tennessee Code Annotated, Sections 40-7-103(3) and (4) as the bases for a claim under Tennessee Code Annotated, Section 9-8-307(a)(1)(N). However, those code sections do not provide the statutory rights required under subsection N since there is no language found in them “expressly confer[ing] a private right of action in favor of the claimant against the state”.

aware as early as October 11, 2006, that something had gone terribly awry in the Jefferson County criminal justice system when several DTF agents and a county law enforcement officer appeared at and thoroughly searched his home and surrounding property for evidence of a marijuana production and distribution operation.

Mr. and Mrs. Welch both contended vigorously from the very start of this nightmare that Mr. Welch was not involved in a marijuana operation. In the Affidavit filed in this case by the Claimant and his wife, in paragraph 12, they swear that after Mr. Welch was arrested, he retained extremely able defense counsel who later informed them the only contraband found on their twenty (20) acres consisted of “some marijuana seeds and stems”. Additionally, in paragraph 14 of that same Affidavit, Mr. Welch states that a suspicious red bag taken during the execution of the search warrant contained only sand, and he told the officers at that time that sand could not be smoked. Further, Mr. Welch states in the Affidavit that the discovery process revealed that the State was relying on the testimony of an “unsavory character and drug dealer” who claimed that Mr. Welch had supplied him with marijuana. Additionally, during the discovery process, Mr. Welch learned no video or audio evidence was produced implicating him in selling drugs.

It is therefore clear that as the criminal process continued from October 11, 2006, up to March 24, 2008, Mr. Welch gained more and more information which supported the position he had asserted from the very start that he was being unjustly accused of a serious crime. Nevertheless, it was not until March 25, 2009, four days shy of one year from the day Judge Stone dismissed the charges against him and nearly twenty-nine (29) months after the ordeal began, that Mr. Welch’s claim was filed with the Division of Claims Administration.

Even if this is a case of negligent care, custody, and control case under the Tennessee Claims Commission Act [and it is not, as explained above], it is barred by Tennessee Code Annotated, Section



9-8-402(b) since no notice of claim or complaint was filed within the nearly eighteen (18) month period following the search on October 11, 2006, and the dismissal of the charges on March 24, 2008. After that dismissal, Mr. Welch waited another three hundred sixty-one (361) days before filing this claim, nearly thirty (30) months after his ordeal began.

Nearly eighteen (18) months intervened between the October 11, 2006, search of the Welch property and the date the charges against the Claimant were dismissed. This was a period during which Mr. Welch was vigorously contesting the charges and was represented by capable defense counsel who from what Mr. and Mrs. Welch have affied in their Affidavits, thoroughly investigated the circumstances underlying the charges against Mr. Welch and then filed and successfully argued a motion to suppress. It is obvious that in formulating his motion to suppress that the Claimant and his defense counsel became aware of flaws in the State's prosecution which supported Mr. Welch's contention expressed from the start that he was being unjustifiably accused. Yet Mr. Welch did not file a claim even though he says he knew from the outset that he was being unjustly accused and that a miscarriage of justice was occurring.

Even if this is a negligent care, custody, and control case under Tennessee Code Annotated, Section 9-8-307(a)(1)(E), under well-established Tennessee case law Mr. Welch could not delay filing his claim until such time as "all the injurious effects and consequences of the alleged wrong are actually known to [him]". See *Rutherford v. First Tennessee Bank Natl. Assoc.*, No. 3:08-CV-19, 2008 WL 3307203 (Tenn.), quoting *Shadrick v. Cocker*, 963 S.W.2d 726, 733 (Tenn. 1998); see also *Stanbury v. Barcardi*, 953 S.W.2d 671, 677 (Tenn. 1997), quoting *Rowe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994).

In fact, in a leading case which originated in this Commission, our Supreme Court in *Shell v. State*, 893 S.W.2d 416 (Tenn. 1995), Reid J. dissenting, quoted approvingly the following language from *Windsor v. A Federal Executive Agency*, 614 F. Supp. 1255 (M.D. Tenn. 1983), affd w/o opinion 766

F.2d 923 (6<sup>th</sup> Cir. 1985):

Under the law of Tennessee, a cause of action accrues when a plaintiff suffers in actuality a legally-cognizable wrong and thus acquires a right to bring suit for redress. ... Where, as here, it is alleged that the defendants disseminated wrongfully, untruthful information about the plaintiff, the cause of action accrues, at the time such dissemination takes place. ...

The Supreme Court has held (in an action brought under 43 U.S.C. § 1983, *supra*), that the applicable state statute of limitations **begins to run at the time of the alleged wrongful conduct, not at the point when the consequences of the conduct became painful.** ... That being so, it can hardly be said that the statute of limitations **does not begin to run until the result of the wrongful conduct ceases to have an effect on the plaintiff.** 614 F.Supp. at 1262-63, *Id.* at 422. (Emphasis supplied.)

As our Supreme Court held in *Shell, supra*, Mr. Welch is not permitted to wait until the termination of a criminal proceeding to file a civil case if he believes the State has negligently charged and detained him, and continued a form of that detention by requiring him to post a bail bond. As the Court said in *Shell*, a potential claimant cannot wait “until the result of the wrongful conduct ceases to have an effect on [him]”. *Id.* at 422. That is precisely what Mr. Welch is asking the Commission to do in this case. This Commission declines to do so.

In an attempt to avoid the statute of limitations bar, Mr. Welch, at pages 10 and 11 of his brief asserts a continuing tort theory and cites an employment law case from the Sixth Circuit United States Court of Appeals, *Chaudhuri v. Tennessee*, 130 F.3d 232 (C.A. 6) (Tenn. 1997) in support of that position. Under this theory, the statute of limitations was tolled until March 24, 2008, when the charges against Mr. Welch were dismissed in Jefferson County Criminal Court. As the State’s reply brief correctly points out, a continuing violation theory has been successfully applied only in employment related situations in Tennessee. (See *Booker v. Boeing*, 188 S.W.3d 639, 645 (Tenn. 2006) and *Rutherford v. First Tennessee Bank Nat. Ass’n*, 2008 WL 3307203 (MD 2008).)

There is yet another very logical reason why Mr. Welch's claim is barred by the statute of limitations found in the Act under Tennessee Code Annotated, Section 9-8-402(b).

In his brief opposing summary judgment, Mr. Welch concedes that his defamation claims are barred by the six month and one year statute of limitations set out in Tennessee Code Annotated, Sections 28-3-103 and 104, respectively. If in fact Mr. Welch does have cause of action for negligent care, custody, and control under Tennessee Code Annotated, Section 9-8-307(a)(1)(N), then the applicable statute of limitations would be the one year period set out in Tennessee Code Annotated, Section 28-3-104, the same period applicable to libel actions under section 28-3-104(1). It is difficult to differentiate between the effects of libelous statements which could arguably extend up through the date the charges against Mr. Welch were dismissed and the effects of an alleged negligent care, custody, and control of Mr. Welch following his initial arrest and release on a bond which was in force until the dismissal of the charges on March 24, 2008. Mr. Welch's concession that the statute has run on his defamation claims would seem to implicitly acknowledge that the statute on a potential negligent care, custody, and control case also ran one year after the search of his home on October 11, 2006.

Finally, to the extent Mr. Welch's claim might conceivably be construed as one for malicious prosecution, it must fail for two reasons. First, there is no provision for such a claim under this Commission's jurisdictional grant found in Tennessee Code Annotated, Section 9-8-307(a)(1). Secondly, Tennessee Code Annotated, Section 9-8-307(d) specifically states that the State will not be liable for "willful, malicious, or criminal actions of state employees".

An essential element of Mr. Welch's claim is showing that it was timely filed. Since Mr. Welch cannot establish, under the facts of this case, that he filed his claim within one year of the date it accrued, he cannot establish that basic, essential element of a tort action.

There being no genuine issue regarding the nature of the claim Mr. Welch has filed or when it was filed vis-à-vis the allegedly offending events – both essential elements or aspects of Mr. Welch's case – the State is entitled to summary judgment under the Tennessee Rules of Civil Procedure, Rule 56.04. (See *Martin v. Norfolk Southern Railroad, supra.*)

Therefore, for the foregoing reasons, Mr. Welch's claim is respectfully **DISMISSED**.

**ENTERED** this the 11<sup>th</sup> day of December, 2009.



**William O. Shults, Commissioner**

P.O. Box 960

Newport, TN 37822-0960

(423) 613-4809

**CERTIFICATE OF SERVICE**

I certify that a true and exact copy of the foregoing document has been forwarded to:

**Francis X. Santore, Jr., Esq.**  
**Santore & Santore**  
**121 East Depot Street**  
**Greeneville, TN 37744**

**Dawn Jordan, Esq.**  
**Office of the Attorney General**  
**P.O. Box 20207**  
**Nashville, TN 37202-0207**

This the 17<sup>th</sup> day of December, 2009.

